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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re Z.L., a Person Coming Under the
Juvenile Court Law.

D055238

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

T.P., et al.,

Defendants and Appellants.

Super. Ct. Case No. NJ013620

APPEALS from orders of the Superior Court of San Diego County, Blaine K.
Bowman, Judge. Affirmed.

T.P. and her daughter, Z.L., (hereafter "mother" and "the child" respectively)
appeal orders denying their Welfare and Institutions Code¹ section 388 petitions and an

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

order terminating mother's parental rights to the child. Specifically, appellants contend the juvenile court erred in denying their section 388 petitions because at the hearing on the petitions (1) they proved a change in circumstance; and (2) the court did not consider the child's best interests. They assert the order terminating parental rights must be reversed as mother and the child share a significant bond, and severance of that bond would be detrimental to the child. They further claim that the court misinterpreted *In re Autumn H.* (1994) 27 Cal.App.4th 567 (*Autumn H.*) and misused the factors the court suggested there for assessing the strength of a parent-child bond to weigh the benefits to the child of maintaining the parent-child relationship as contrasted to adoption. Appellants' contentions lack merit and, consequently, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

On February 16, 2007, the San Diego County Health and Human Services Agency (the Agency) filed a petition on behalf of the then nine-month-old child under section 300, subdivision (b), alleging she was at substantial risk because of violent confrontations between her parents, mother and Allan L. Mother and Allan had a history of domestic violence. At the time, mother was on criminal probation for stalking a former boyfriend and she had earlier been arrested for substance abuse, making threats, battery on emergency personnel, spousal abuse, vehicle theft and being drunk in public. After a violent incident in September 2006, police heard mother tell Allan she would kill him and the child. The court ordered the child detained and placed her with the maternal grandmother (the grandmother).

In a March 2007 report prepared for the jurisdiction and disposition hearing, the social worker reported mother admitted her past drug use. Initially, she denied any domestic violence with the child's father and said the police had lied, but then said the police reports were true. The report also disclosed that mother's probation officer told the Agency that mother had completed a domestic violence program, but did not use what she had learned when she and Allan began to have problems. According to the report, mother began a substance abuse program, but was discharged when she was disrespectful to staff and peers. Mother's therapist asserted mother was working on anger and "verb[i]age" control. The therapist was unaware mother had completed a 52-week domestic violence program but still engaged in violent behavior.

The Agency provided the court with the report of mother's psychological evaluation. Mother was diagnosed with an adjustment and personality disorder. The evaluator recommended a substance abuse assessment, parenting classes, anger management and domestic violence treatment, therapy, and a peer group socialization class.

At the jurisdictional and dispositional hearings in April 2007, the court found the allegations of the petition true, ordered the child placed in relative care and the parents to participate in services, including drug treatment through the Substance Abuse Recovery Management System (SARMS). Mother was allowed to spend alternate weekends in the grandmother's home.

The following month, the Agency petitioned under section 388 requesting modification of the disposition order, alleging mother had verbally and physically

attacked the grandmother. The child was detained in foster care. The court granted the Agency's section 388 petition, ordered that visits be supervised and that the child be returned to placement with the grandmother. The court also granted the grandmother de facto parent status.

The Agency's report prepared for the six-month review hearing disclosed that in September 2007 mother and her sister were arrested for being drunk in public. They were abusive and shouted racial slurs. The social worker informed the court that mother had completed a parenting class and was continuing therapy to address anger issues.

At the six-month review hearing and again at the 12-month hearing, the court continued the child in out-of-home placement and continued services. In March 2008 the child began a 60-day visit with mother. However, in June mother was arrested for driving while intoxicated and was incarcerated. The Agency filed a petition under section 387 for the child's removal. The child was returned to the grandmother's home.

In the report prepared for the 18-month review hearing, the Agency's social worker recommended terminating services and setting a section 366.26 hearing. By this time, the probation department had placed mother into a residential treatment program and she had been re-referred to therapy. The Agency noted that although mother had made progress with her case plan, she continued to display self-sabotaging, self-destructive behavior, which indicated a continuing lack of self-control.

At the 18-month review hearing, the court terminated services and set a section 366.26 hearing. The child remained placed with her grandmother.

In the report prepared for the section 366.26 hearing, the social worker recommended that the child be adopted. The social worker said the child was in good health, but there were some concerns about her language development and tantrums. The grandmother was willing to adopt were the child not returned to mother. Additionally, there were numerous approved adoptive families willing to adopt a minor like the child. The social worker opined that while mother and the child had a significant relationship, the benefits the child would receive from maintaining the parent-child relationship did not outweigh the stability and security she would receive through adoption. The social worker also noted that the grandmother was not interested in guardianship of the child.

The case was set for a hearing, but was continued at mother's request so that she could obtain a bonding study. Dr. Raymond Murphy performed the bonding study. His report concluded that mother and the child had a strong, nurturing relationship, and the child preferred mother to the grandmother. However, a social worker reported that during visits at a visitation center, the child refused to let the grandmother out of her sight and the grandmother sometimes had to intervene when the child had tantrums.

In March 2009 mother and the child petitioned under section 388, requesting that the child be returned to mother and six months of family maintenance services be provided. As changed circumstances, mother asserted she was out of custody, was complying with her probation conditions, was drug testing and was employed. She argued the bonding study showed placement with her was in the child's best interests.

In April 2009 Allan, who had moved to Texas, reported mother had been sending him, his new fiancée and his fiancée's teenage son harassing e-mail messages. Allan reported the matter to local police, which put mother in violation of a restraining order.

At the contested section 388 and 366.26 hearings held in May and June of 2009, the social worker testified she could not recommend that the child be returned to mother because of mother's continuing instability, volatility and inability to deal with her anger. While the problems which had led to the child's dependency had been ameliorated to some extent, things continued to fluctuate. The social worker opined mother needed more time to stabilize, as there was a high potential for relapse, and mother still displayed very volatile behaviors.

The psychologist who performed the bonding study, Dr. Murphy, testified he observed a significant relationship between mother and the child, and opined that severing the parent-child relationship would cause some emotional damage to the child. Murphy admitted that any damage would be mitigated by the child's strong attachment to the grandmother and by remaining in a familiar environment.

Mother testified she had always provided most of the child's care and that they shared a close relationship. She said she no longer had a problem with alcohol and blamed Allan for harassing her. Mother testified her e-mail messages to Allan were only to say she objected to him visiting the child.

Allan testified mother had initiated the sending of e-mail messages and she had threatened him, his fiancée and his fiancée's son.

The grandmother testified mother visited and provided care for the child every day. She said she believed mother had changed and was able to parent the child. The grandmother's first choice of a permanent plan was for the child to be returned to mother, but if that were not to be, she preferred adoption over guardianship.

After considering the evidence and argument, the court denied the section 388 petitions, finding mother had not shown a change of circumstances. The court noted that while mother was doing a number of positive things with her life and had periods of stability, those periods were short lived and, thereafter, mother reverted to her old behaviors. Since mother had not met her burden to show a change of circumstances, the court stated it need not address the child's best interests.

After the court ruled on the section 388 petitions, it commenced the trailing section 366.26 hearing. The court heard further testimony and argument of counsel, and took the matter under submission.

Two days later the court issued its ruling. It found the child generally and specifically adoptable. Turning to the beneficial parent-child relationship exception to adoption, it found mother had maintained regular visitation and contact with the child, and noted that continuing the contact would confer some benefit on the child. However, generally referring to *Autumn H.*, *supra*, 27 Cal.App.4th 567, the court found that the benefits to the child of adoption outweighed the maintenance of the parent-child relationship. It terminated parental rights and ruled adoption would be the permanent plan.

II DISCUSSION

A. *Denial of Mother's and Child's Section 388 Petitions*

Mother and the child contend the court erred by denying their section 388 petitions because at the hearing they proved a change of circumstances; the court wrongly based its findings on unreliable evidence that mother sent harassing e-mails to Allan; and the court erred in not considering the child's best interests. We disagree.

After a court has terminated reunification services, "the focus shifts to the needs of the child for permanency and stability." (*In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1800.) However, "[e]ven after the focus has shifted from reunification, the [statutory] scheme provides a means for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of [her] custody status." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*))

A change of circumstances may be brought to the court's attention through a petition under section 388. Section 388 provides in part:

"(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court"

"(d) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held"

In order to gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the

minor's best interests. (§ 388; Cal. Rules of Court, rule 5.570; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).)

"The [section 388] petition is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) A reviewing court will not disturb a court's discretionary ruling in a dependency proceeding ""unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."" (*Stephanie M., supra*, 7 Cal.4th at p. 318.)

Neither mother nor the child has shown the court abused its discretion by finding they did not show a change of circumstances within the meaning of section 388. Mother has a history of criminal behavior, of acting impulsively and of not being able to control her anger. At the time the dependency case began, she was on probation for stalking a former boyfriend. She earlier had been arrested for substance abuse, making threats, battery on emergency personnel, spousal abuse, vehicle theft and being drunk in public. Mother's underlying anger and inability to restrain her emotions had resulted in the child being exposed to domestic violence and being removed from her custody.

Mother participated in services and worked toward the child being returned to her custody, but in May 2007, she verbally and physically attacked the grandmother and was convicted of assault. In September 2007 she was arrested for being drunk in public. In

March 2008 the child began a 60-day visit with mother, but after the child had been living with her for three months, mother was arrested for driving while intoxicated. Further, at the hearing on the section 388 petitions, the court heard testimony that although mother had been participating in services for nearly two years, was no longer in residential care, was compliant with her probation and was employed, she recently had been exchanging ugly, threatening e-mail messages with Allan and his fiancée.²

Examining this history, the court concluded that despite mother's participation in services and periods of stability, she continued to revert to her old pattern of volatile behavior. Reviewing the record under the appropriate appellate standard, we determine the court did not err by denying appellants' section 388 petitions. (*Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319 [the appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason, and when two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court].) While the record shows mother was able to make progress and remain calm for a time, it also establishes that she continued to have trouble controlling her anger and impulses. This repetitive behavioral pattern continued to pose a risk of substantial harm and instability to the child.

² Mother contends the evidence about her e-mail exchange with Allan was unreliable. We disagree. Mother did not contest the fact she sent e-mails to Allan, but merely sought to justify her reasons for doing so. The court was entitled to make credibility determinations about the e-mail exchange and to give mother's involvement in that exchange whatever weight it determined to be due. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53 (*Casey D.*)).

Mother and the child have not shown the court abused its discretion by finding there had not been a change of circumstances within the meaning of section 388 and by denying their section 388 petitions.³

B. *The Parent-Child Exception to Termination of Parental Rights and Adoption Did Not Apply.*

Mother and the child assert the court erred by finding the parent-child relationship exception to termination of parental rights and adoption of section 366.26, subdivision (c)(1)(B)(i) did not apply in this case. Specifically, they assert both the bonding expert and the social worker recognized their bond and, further, that it would be detrimental to the child to sever their relationship. They claim the court misinterpreted the teachings of *Autumn H.* because, instead of applying the factors the *Autumn H.* court suggested to assess the strength of the parent-child bond, it used those factors to weigh the benefits of maintaining the parent-child relationship against the benefits of adoption. We determine there was no error, and that substantial evidence supports the court's finding the exception did not apply.

Adoption is the permanent plan favored by the Legislature. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 573.) A child has a compelling right "to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the

³ As we conclude appellants have not carried their appellate burden to show the trial court abused its discretion in finding no change of circumstances warranting reversal, we also conclude there was no error by the court in failing to address the best interests of the child during the section 388 hearing. (§ 388; see *Casey D.*, *supra*, 70 Cal.App.4th at p. 45.)

child." (*Marilyn H.*, *supra*, 5 Cal.4th at p. 306.) If the court finds by clear and convincing evidence that a child is adoptable, it becomes the parent's burden to show that termination of parental rights would be detrimental to the minor because of a specified statutory exception to termination of parental rights and adoption. (*Autumn H.*, at p. 574.)

Under the exception found in section 366.26, subdivision (c)(1)(B)(i), the parent is required to show termination of the relationship would be detrimental to a child in that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." "[M]ore than just 'frequent and loving contact'" is required "to establish the requisite benefit for [the] exception." (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.)

In *Autumn H.*, this court explained that when determining whether the exception is present, the juvenile court must balance the parent-child relationship against the benefits the minor would gain from the security and permanence of adoption by a new family. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The court stated:

"[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

The court further stated:

"The [section 366.26, subdivision (c)(1)(B)(i)⁴] exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between the parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.)

We review the sufficiency of the evidence to support the lower court's ruling on the applicability of the beneficial parent child relationship exception to adoption by examining the evidence in the light most favorable to the order, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

Mother and the child have not shown the juvenile court erred in finding the exception of section 366.26, subdivision (c)(1)(B)(i) did not apply. The court thoroughly weighed the benefits of continuing the parent-child relationship against the stability and permanence of adoption. Its findings that the benefits of adoption outweighed the benefits of maintaining the relationship between mother and the child and, further, that the child would not be greatly harmed by severing the relationship are fully supported in the record.

⁴ At the time the *Autumn H.* opinion was filed, the beneficial parent-child relationship exception was found at section 366.26, subdivision (c)(1)(A). Effective January 1, 2008, the subdivision was renumbered without change to the statutory language and is now found at section 366.26, subdivision (c)(1)(B)(i). (Stats. 2007, ch. 565, § 4, p. 3577.)

The court first found mother had maintained regular visitation and contact with the child and that they shared a significant bond.⁵ The court also considered the various interactions between mother and the child and found that continued interaction between the two would confer some benefit on the child. However, the court had "grave concerns" about mother's long-established pattern of criminal activity, substance abuse, threats of violence against others, domestic violence incidents, extremely poor judgment and lack of self-control. The court also noted that because mother remained on probation, there was a risk she would be incarcerated in the future.⁶

⁵ The evidence on the strength and intensity of the child's emotional attachment to mother is mixed. The social worker observed nine visits between mother and the child at the grandmother's home and at a visiting center. The social worker stated visits were positive and enjoyable, but that the child was becoming less focused on mother and more focused on the grandmother. She testified the child was beginning to appear anxious during visits, wanting to be with the grandmother, calling out for her, and once leaving the room to look for her.

By contrast, Dr. Murphy, the psychologist who assessed the bond between mother and the child, observed only one two-hour meeting between parent and child at the home the child shared with the grandmother. Murphy opined the child and mother shared a significant relationship and that the child would suffer emotional damage from severance of that relationship. He observed, however, that the child insisted that the grandmother give her breakfast, and she appeared very comfortable with the grandmother. Murphy also said he could speak only hypothetically about the benefits of maintaining the mother and child's relationship against the benefits of adoption.

The court was entitled to rely on the social worker's opinion. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420-1421.) It had authority to assess the credibility of the two witnesses and give the social worker's opinion greater weight. (*Casey D.*, *supra*, 70 Cal.App.4th at p. 53.)

⁶ The child's counsel claims her argument that the court's ruling was not supported by substantial evidence is shown by the court's expressly recognizing it was "speculating about the future" when it found continued contact could lead to negative consequences for her. This is a mischaracterization of the court's comments. In fact, the court stated: "It's hard to predict the future, but the court, looking at [mother's] long history and long

The court then turned to balancing whether the child would benefit more from the security of an adoptive home than from maintaining the emotional attachment she shared with mother. In making its assessment, the court noted that weighing in favor of adoption were the following factors: the child's young age; the fact she was only nine months old when her dependency began and at the time of the hearing had just turned three; and that she had spent two of her three years in the grandmother's care.⁷

We discern no error from the court's consideration of these factors in determining whether the parent-child relationship between mother and the child should continue under the section 366.26, subdivision (c)(1)(B)(i) exception. As the *Autumn H.* court noted, continued interaction between a natural parent and child *will always confer some* incidental benefit on the minor. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) However, the pertinent question is whether the benefit of continuing that relationship promotes the well-being of a child *to such a degree* as to outweigh the well-being a child would gain in

pattern of poor judgment leads this court to believe, although it could be considered speculative because no one can accurately predict the future — but if past behavior is a predictor for the future, the court finds that there is possibility of negative consequences from allowing the continued interaction. The court did not impermissibly "speculate" about the future, but logically based its finding of potential future risk to the child on mother's long history of a pattern of criminal activity, substance abuse, threats of violence, domestic violence, poor judgment, lack of self-control and the risk of future incarceration. The child has not shown error. (See generally *In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169-1170 [a parent's past conduct is a good predictor of future behavior].)

⁷ We note the court stated in making its ruling it was not considering the appropriateness of the grandmother's home. It stated, "I want the record to reflect that in reaching this decision, the court is not considering the suitability of the maternal grandmother's home, deciding whether or not to terminate [mother]'s parental rights."

a permanent home with new, adoptive parents. Only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent *such that* severance of the relationship would *greatly harm* the minor, are the exceptional circumstances present to overcome the legislative preference for adoption. (*Ibid.*) And, as *Autumn H.* teaches:

"The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent-child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent-child bond." (*Autumn H., supra*, 27 Cal.App.4th at pp. 565-576, italics added.)

Because, as the parties agreed, mother and the child shared a strong bond, it was incumbent upon the court to evaluate the strength and quality of that bond to assess its significance in comparison to the benefits of adoption. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) Far from erring, the court followed the explicit instructions of *Autumn H.* to examine the exception *by taking into account* the variables that affected the parent-child bond.

We also reject mother's argument that terminating her parental rights was error because Dr. Murphy and the social worker both said the child would suffer detriment if they had no more contact. Neither witness testified that the child would suffer *great harm* were the natural parent-child relationship severed. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) Dr. Murphy testified "breaking [the parent-child] relationship, if there is to be no more contact, will result in *some kind of emotional damage* to the child."

He made a similar statement in his report. The social worker stated, the child would suffer *some detriment* if the relationship were severed.

Finally we reject mother's and the child's assertion that *In re S.B.* (2008) 164 Cal.App.4th 289, a case from this court, compels application of the parent-child exception to adoption. While factual comparisons between cases provide insight, these comparisons are not dispositive. The determination on appeal is whether there is substantial evidence to support the trial court's findings the beneficial parent-child exception did not apply. Here, the court's findings are fully supported. Mother and the child have not shown error by the court finding the exception of section 366.26, subdivision (c)(1)(B)(i) did not apply.

DISPOSITION

The orders are affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.